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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KRISEL, BECK & TAYLOR
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC., Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 6, 1958 (RA 71),* affirming a final decree in admiralty (RA 1) entered upon an order of the United States District Court for the Northern District of New York which reversed the findings and conclusions of the Commissioner appointed by the District Court to ascertain and compute the amount of Libelant's (Cargill, Inc.) damages.

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* "PA" refers to Petitioners' Appendix in the Court of Appeals; RA refers to Respondent's Appendix in that Court; R refers to record pagination.

Opinion Below

The Court of Appeals affirmed the final decree of the District Court on the opinion of that Court (RA 69). The opinion of the District Court (PA 90a-97a) is reported in 1957 A.M.C. 1563, and has not been officially reported. The Report of the Commissioner (PA 73a-89a) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 6, 1958 (RA 71). The jurisdiction of this Court is invoked under Section 1254 of Title 28, U. S. C. A.

The Supreme Court Admiralty Rule Involved

The pertinent provisions of Rule 43½ of this Court's Admiralty Rules are as follows:

> "In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: • • • "

Questions Presented

Two barges laden with wheat sank as a result of a collision with Petitioner's vessels, in the fresh, shallow water of the Hudson River near Albany. Petitioners having been

found at fault for the collision, a Commissioner in Admiralty was appointed to ascertain the cargo owner's damages. After a hearing, the Commissioner, on uncontradicted, unimpeached testimony of experts, whose testimony, in part, was buttressed by documentary evidence, found that most of the wheat could have been recovered, dried and sold as animal feed for which there was a regular wholesale market at a price which would have netted the cargo owner an amount that would have reduced an otherwise total loss of $75,000 to about $36,000. The questions are:

1. Must a District Court on reviewing a Commissioner's report, under Admiralty Rule 43½ accord the Commissioner's fact findings the same degree of finality that a reviewing Court is required to accord to fact findings of a trial judge in a non-jury case?

2. Assuming that the answer to Question "1" is in the affirmative, so that the "clearly erroneous" standard of review as laid down by this Court in *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 339; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395; and, *McAllister* v. *United States*, 348 U. S. 19 applies to review of fact findings by a Commissioner, did the courts below depart from this standard by rejecting the fact findings of the Commissioner summarized in the preamble to these Questions?

3. By formulating the "clearly erroneous" standard of review as this Court did in the cases mentioned in the preceding Question, did this Court intend to permit a reviewing court to reject fact findings by its Commissioner representing the acceptance of uncontradicted testimony by witnesses in no way impugned, merely because the reviewing court is left with the conviction that the Commissioner was mistaken in crediting that testimony?

4. Were the courts below warranted in concluding that the wheat in the sunken barges was a total loss in view of the duty which this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377, 386-388 cast upon the owner of a vessel sunk by collision in *shallow* waters, near the shore, to undertake "by reasonable exertions" (*The Baltimore* at 19 L. ed. p. 465) to prevent a total loss, where, as here, the vessel may easily be raised and the cargo salvaged at a cost but a fraction of the salvage value?

5. Whether in the circumstances of this case, the Courts below erred in concluding that the cargo owner sustained a total loss?

Statement

A collision occurred as a result of which two barges with their cargoes of wheat, aggregating 37,500 bushels, sank in the fresh shallow waters of the Hudson River near Albany, New York. Petitioners were found to be liable for the collision and a Commissioner in admiralty was appointed to assess Libelant's damages. After a hearing, the Commissioner reported that the wheat in the sunken barges was worth $75,000 in sound condition; that most of the wheat could have been salvaged and sold as animal feed for a price that would have resulted in a net salvage recovery of approximately $40,000; but that the cargo owner had failed to take reasonable steps to accomplish salvage and the Commissioner therefore concluded that the recovery of the cargo owner should be reduced by the net amount that would have been realized had salvage been undertaken (PA 73a-89a).

The Commissioner found that the wheat could have been dried and sold in the New York wholesale market as animal feed for approximately $50,000, that the total expense in-

volved would have been under $12,000 and fixed libelant's damages at about $36,000 (PA 81a-84a, Bouchard Exhibits 4, 5 and 5a).

The District Court set aside the Commissioner's report and gave Libelant judgment for the full value of the sunken wheat as a total loss because the Court took the view that the Commissioner had applied the rule that requires minimization of preventable damages too harshly (PA 92a). In rejecting the findings of the Commissioner, the District Court observed that one of the expert witnesses was a dairy farmer, with the implication that his testimony was not worthy of acceptance (PA 95a). The fact is however, that the witness had been in the feed grain business for years and was also the owner of a herd of cattle. No reason at all was given by the District Court for rejecting the testimony of the other experts, or for ignoring documentary evidence as to the market price of animal feed which confirmed their testimony. Once the District Court had concluded that the Commissioner erred in finding that the wheat could have been sold as animal feed for the large amount that the evidence revealed could have been obtained, there was, of course, no basis for sustaining conclusion of the Commissioner that salvage should have been undertaken. On appeal the Court of Appeals affirmed, on the opinion of the District Court (RA 69).

Reasons for Granting the Writ

1. The Courts below have misapprehended the standard of judicial review under Admiralty Rule 43½, in reversing the Commissioner.

Under Admiralty Rule 43½, which declares that "in all references to commissioners * * *, the report of the com-

missioner * * * shall be treated as presumptively correct," and permits the court to reverse the commissioner only when satisfied "that error has been committed," the standard of judicial review, as we shall point out, is the same as under the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure.

There has long been a distinction between a reference to a commissioner or a master on consent of the parties, and a compulsory reference by the court. In *Kimberly* v. *Arms* (1889), 129 U. S. 512, 523, this Court stated that, absent consent of both parties, a court "cannot of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers" (129 U. S. at 524). But prior to September 1, 1932, when Admiralty Rule 43½ and Equity Rule 61½ became effective, a district court had the right to make a reference in an admiralty or equity case to a commissioner or master which would be advisory merely, and in which the report would be in no way binding upon the court. This Court in *Kimberly* v. *Arms*, in discussing such an advisory report said that on review the court might "accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence" (129 U. S. at 523) the findings of the commissioner.

A fundamental change of policy in regard to compulsory references occurred however, with the coming into force of Admiralty Rule 43½ and Equity Rule 61½. The history of this change is discussed in the opinion of Judge Maris, writing for the unanimous Court, setting *en banc*, in *United States* v. *Kirkpatrick*, 186 F. (2d) 393. The Court in *Kirkpatrick* concluded that Admiralty Rule 43½ and its equity analogue had abolished advisory references, and had imposed upon the commissioner the duty of passing

upon the merits and of making definitive findings and conclusions; further that "the findings of fact so made (were) subject to modification or rejection by the district court only if it is fully satisfied that error has been committed" (186 F. (2d) 393 at 397). Judge Maris went on to say:

> "It is settled that the criterion under Admiralty Rule 43½ is the same as that now laid down in civil cases by Civil Procedure Rule 53(e), 28 U. S. C. A., the successor of Equity Rule 61½, namely, that "the court shall accept the master's findings of fact unless clearly erroneous." Todd Erie Basin Dry Docks v. The Penelopi, 2 Cir. 1945, 148 F. 2d 884, 886; Pioneer Import Corporation v. The Lafcomo, 2 Cir. 1947, 159 F. 2d 654, 656, certiorari denied; Black Diamond Lines v. Pioneer Import Co., 331 U. S. 821, 67 S. Ct. 1310, 91 L. Ed. 1838; Ozanic v. United States, 2 Cir. 1948, 165 F. 2d 738, 742; Zeller Marine Corporation v. Nessa Corporation, 2 Cir. 1948, 166 F. 2d 32. The effect of Admiralty Rule 43½, therefore, is that in the ordinary case a finding of fact by a commissioner based upon conflicting testimony and a determination of the credibility of the witnesses before him is final in the sense that the district court on review may not substitute its judgment as to the weight of the evidence or the credibility of the witnesses for that of the commissioner." 186 F. (2) at p. 397.

From what has been said, it is clear that the standard of judicial review of a fact finding, whether by a Commissioner, or a Master, or a Judge in a non-jury case, is the same: namely, that the finding should not be disturbed unless "clearly erroneous."

When then, may a finding be said to be "clearly erroneous?" In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, this Court has said that a finding

> "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Although this Court's definition of what the phrase "clearly erroneous" means in the *Gypsum* case, read in its context, affords a criterion which can be applied without difficulty, there is a narrow class of cases in which the test laid down, read out of context, has been too broadly interpreted by the reviewing courts. The case at bar is a clear illustration of what we mean.

The question before the Commissioner was whether or not the owner of the sunken wheat had made reasonable exertions to prevent avoidable aggravation of damage. Three practical fact questions underlay the most critical aspect of this inquiry, namely: (1) how much of the wheat could be recovered out of the sunken hulls; (2) the cost of getting the wheat out of the barges, transporting it to New York City where it could be dried and sold in the wholesale animal feed market; and (3) what price it would have commanded if sold for animal feed in that market. The first thing to observe is that all three questions are pure questions of fact. The amount of wheat that could have been and, in fact, was recovered, was not a difficult question, nor did the parties differ greatly on the expense involved in the salvage operation. The cargo owner's representative conceded that if the wet wheat had been dried, "you might get as much as a feed price for it * * * " (PA 15a, 16a). Petitioners' witnesses all testified that the wheat, if dried, could have been sold as animal feed grain. Thus, there was no controversy that the wet wheat could have been dried and sold as animal feed. This left open only the question of the price of animal feed in New York in the month of October, 1953, when the sale could have been

made. As to this, petitioners put in evidence, without objection, a trade publication (Pet. Exh. 4) and an exchange of telegrams with its publisher (Pet. Exhs. 4 and 4a) that confirmed the wholesale market price of brewers' dried grain in October 1953.

Petitioners also produced two expert witnesses, one of whom had been in the animal feed business for more than twenty years, dealing primarily in brewers' dry and wet grains, and the other in the business of selling animal feeds made from grains. These witnesses, without contradiction, testified that the wheat, if totally saturated with water, would, after reconditioning, have had a value equal to, if not greater than, dried brewers' grain, which had an actual market value of $57.00 per ton during the entire month of October, 1953.

Noting that this oral testimony was uncontradicted, and was buttressed by confirmation from a disinterested market report, which was received without objection, the Commissioner made the critical findings that:

"Libellant knew that a cargo valued at $75,000 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Survey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my opinion, nominal. He was not called as a witness for libelant.

> For these reasons, I find that the libelant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libelant had undertaken such an operation" (PA 85a).

The District Court rejected this finding, stating:

> "There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York Market. Even if such evidence were reliable and in closer harmony with reality, it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case" (PA 95a-96a).

The Court of Appeals affirmed on the opinion of the District Court and therefore adopted the rejection of the Commissioner's finding on this crucial fact question. In doing so, we believe the courts below departed from the correct standard of judicial review.

We do not question the fact that a reviewing Court under Admiralty Rule 43½ is entitled to reject a fact finding by the Commissioner if the Court concludes that such fact finding is "clearly erroneous" in the sense that this Court used the phrase in the *United States Gypsum Co.* case. It is important, however, to bear in mind the context of the *Gypsum* case in understanding the phraseology that this Court used in explaining when a fact finding by a judge in a non-jury case is to be deemed "clearly erroneous." In *Gypsum*, an anti-trust action, this Court noted that the Government "relied very largely on documentary exhibits" (333 U. S. at 395) for the purpose of demonstrating that the authors of the documents had acted in

concert. The oral testimony of the defendants was a denial that they had acted in concert, or that they had agreed to do the things which, in fact, were done. The Trial Judge credited the denials, even though the facts denied were established by *ante litem motam* documents. This Court, in rejecting the denials, declared: "Where such testimony is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the Trial Court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous" (333 U. S. at 396).

In *Gypsum*, moreover, this Court stressed the importance of a Trial Judge's advantage in resolving testimonial conflicts, or in assessing the credibility of a witness, when it noted that findings of the Trial Court "when dependent upon oral testimony where the candor and credibility would best be judged, had great weight with the Appellate Court" (333 U. S. at 395). The interpretation of *Gypsum* just advanced is also buttressed by this Court's decision in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, an anti-trust suit in which this Court affirmed the Trial Judge's findings against the Government. The opinion of the Trial Court (80 F. Supp. 936) makes it clear that, unlike the *Gypsum* record, the oral testimony was not contradictory of inferences that could reasonably be drawn from the documentary evidence. The critical issue was whether the trial judge was warranted in accepting the defendant's oral testimony weighed in the light of the documentary evidence which was of an equivocal nature. This Court, in sustaining the Trial Court, noted that the issues concerned the design, the motives, and intent with which the defendants had acted, and that the Trial Court had the benefit of hearing and seeing the witnesses who had made the

records from which the Government would draw an inference of guilt but had concluded that the documents were consistent with an innocent meaning (338 U. S. at 341). Mr. Justice Jackson, writing for the majority, in affirming the Trial Court, stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not "clearly erroneous" (338 U. S. at 342).

In the case at bar, the crucial fact findings of the Commissioner were supported by uncontradicted oral testimony in no way discredited, and in part by written confirmation from a disinterested source. The Commissioner who had the opportunity to see and hear the expert witnesses believed them.

The rejection of fact findings supported by such evidence is plainly arbitrary.

On what basis, then, did the District Court reject the Commissioner's findings that this wheat could have been salvaged if reasonable steps had been taken to recondition and sell it in the animal feed market? So far as we are able to understand, the rejection rests on nothing more than a subjective belief by the District Judge that the expert witnesses did not know what they were talking about—a judgment not supported by anything in the record. Experience teaches that such *a priori* assumptions are very dangerous when the subject matter is the province only of an expert in a highly specialized trade. Plainly, therefore,

the District Court misapprehended the scope of review contemplated by Admiralty Rule 43½.

It is of the utmost importance, especially in admiralty cases, where Commissioners are regularly employed in ascertaining damages, that this Court make it clear that its statement in *Gypsum* that the reviewing court may reverse a fact finding of its commissioner if left with the definite and firm conviction that a mistake has been committed, was not intended to permit a reversal of a finding that represents the resolution of a testimonial conflict or the appraisal of the credibility of witnesses, absent record evidence that impugns the reliability of the oral testimony.

2. The decision in the case at bar is in conflict with the decision of this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377. In *The Baltimore*, a schooner laden with coal was sunk in collision with a steamer in the Potomac River. The lower court found her and her cargo to be a total loss. In reversing the decree which rested on that finding, this Court declared:

> "Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions, the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury." *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377 (19 L. ed. 463, 465-466).

Mr. Justice Clifford, writing for the unanimous Court, went on to say:

> "Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs had been made" (19 L. ed. at p. 465).

In the present case, two sunken barges, laden with wheat, were in shallow water. In fact, the deck of one was above the water level at low water. Furthermore, the barges came to rest only a short distance from the shore. As we understand the doctrine of *The Baltimore*, a finding that the wheat was a total loss should not have been made, absent evidence either that the cargo could not be raised, or that the cost of raising and drying the wheat would have been greater than its value after such reconditioning. It should also be noted that in *The Baltimore*, the burden of adducing that evidence rests with the owner of the vessel or cargo who asserts a total loss. The Commissioner in this case concluded that the cargo owner did not meet the burden cast upon it to demonstrate that the wheat was a total loss. In his report, the Commissioner stated:

> "Libelant knew that a cargo valued at $75,000.00 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Sur-

vey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my opinion, nominal. He was not called as a witness for libelant.

For these reasons, I find that the libelant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libelant had undertaken such an operation" (PA 84a).

At the hearing before the Commissioner, Mr. Horn stated that his object in sending Mr. Hyland to Albany, following the disaster, was to investigate the possibility of arranging for the sale of the wheat, "as is, where is," in the sunken barges. Horn stated that he was satisfied that the amount that he could realize for the wheat as *wet wheat* would not be enough to compensate him for the expense involved in its recovery (PA 16a). Mr. Horn did not investigate the feasibility of drying the wheat and selling it for animal feed. He conceded at the hearing before the Commissioner that a feed price might have been obtained, but when asked why he did not adopt this method of salvage, contented himself with saying that he preferred not to gamble. He did not, however, attempt to explain that such a project involved a gamble and conceded that he had made no effort to find out how much the feed price was at the time. Petitioners, as has been noted, adduced evidence which was uncontradicted that most of the wheat could have been recovered and dried and sold for feed grain and would have reduced the cargo loss from $75,000 to approximately $36,000. The Commissioner was plainly justified in concluding that the cargo owner did not meet the burden

which *The Baltimore* casts upon it of demonstrating that the cargo was a total loss.*

The District Court in rejecting the Commissioner's findings concluded that the abandonment by the cargo owner of any attempt at salvage was reasonable. As has been noted, the District Court aribitrarily rejected the crucial fact findings of the Commissioner that most of the wheat could have been recovered, reconditioned, and sold for animal feed at a price that would have greatly reduced the loss. Indeed, if the wheat could not have been dried and sold for animal feed; if, contrary to the fact, its only value was as *wet wheat,* we would never have questioned that the cargo was a total loss. The other reasons which the District Court gave to justify Mr. Horn's decision to abandon the cargo as a total loss would have no validity if the cargo had great salvage value as the Commissioner found. In short, Petitioners demonstrated that this wheat was not a total loss, and the cargo owner's representative, Mr. Horn, failed completely to demonstrate that it was a total loss, a burden which *The Baltimore* rule casts upon the cargo owner.

The doctrine of *The Baltimore* has been a fundamental tenet of the shipping industry for almost one hundred years. The decision below subverts the sound policy considerations that underlie its doctrine. In modern times, when most bulk cargoes are insured, with the result that the owner on being paid by his underwriter no longer has a financial interest in salvaging his property, there is greater danger than in the past that no or half-hearted salvage attempts will be made. In this very case, Cargill, Inc., probably the most important grain dealer in the world, did nothing itself to effect salvage because it had been paid the full value of the wheat.

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* Compare the salvage measures undertaken in raising, drying, and selling sunken wheat in *The Glenbogie*, 1937 A. M. C. 1194 (not otherwise reported) with the cavalier gesture in the present case.

CONCLUSION

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISEL, BECK & TAYLOR
Attorneys for Petitioners

ROMAN BECK
Of Counsel

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149—October Term, 1957.

(Argued January 13, 1958 Decided February 6, 1958.)

Docket No. 24763

CARGILL, INC.,

Libelant-Appellee,

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY,

Claimant-Respondents,

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

Claimant-Respondents-Appellants,

and

INLAND SURVEY BUREAU, INC.,

Respondent-Impleaded-Appellee.

Before:

MEDINA and MOORE, *Circuit Judges,*
and GALSTON, *District Judge.*

Appeal from an order of the United States District Court for the Northern District of New York awarding damages to libelant for the total loss of cargo on the barges Marion O'Neil and Mae Lowery. James T. Foley, *Judge*. Opinion below not reported. Affirmed.

ATKINS & WEYMAR, New York, N. Y. (Horace T. Atkins, New York, N. Y., of Counsel), *for libelant-appellee*.

KRISEL, BECK & TAYLOR, New York, N. Y. (Roman Beck, New York, N. Y., of Counsel), and James F. Dalton, Albany, N. Y., *for claimant-respondents-appellants*.

PER CURIAM:

Affirmed on Judge Foley's opinion, filed June 4, 1957.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February one thousand nine hundred and fifty-eight.

Present:

Hon. Harold R. Medina,
Hon. Leonard P. Moore,

Circuit Judges,

Hon. Clarence G. Galston,

District Judge.

Cargill, Inc.,

Libellant-Appellee,

—v.—

Tug Frank A. Lowery, *et al.*,

Respondents-Appellants,

and

Inland Survey Bureau, Inc.,

Respondent-Impleaded.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk